Rapidin bin Kamal v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO B –05 –04 OF 1999
RICHARD MALANJUM, MOHD GHAZALI AND HASHIM YUSOFF JJCA
27 SEPTEMBER 2005

Criminal Procedure — Appeal — Evidence — Fresh or additional evidence — Whether application by way of Notice of Motion may be made to appellate court to adduce fresh or additional evidence — Whether such application within the ambit of s 317 Criminal Procedure Code

Evidence — Fresh or further evidence — Admission of, on appeal — Whether application may be made by Notice of Motion to adduce fresh or additional evidence — Whether such application within the ambit of s 317 Criminal Procedure Code

The appellant was convicted and sentenced for rape in the sessions court. He appealed to the High Court against conviction and sentence. In the High Court, the appellant applied by way of Notice of Motion to admit in evidence a purported 'Surat Akuan' or statutory declaration by the complainant in the rape charge preferred against him. The application was pursued under s 317 of the Criminal Procedure Code ('the CPC'). The High Court however rejected and dismissed the application. The appellant thus appealed to the Court of Appeal. In submissions before the Court of appeal, counsel contended that the High Court judge erred in not following the test laid down in *Che Din bin Ahmad v Public Prosecutor* [1976] 1 MLJ 289 and *Lau Foo Sun v Government of Malaysia* [1970] 2 MLJ 70.

Held, dismissing the appeal:

(1) The High Court found that the appellant's application did not come within the ambit of s 317 of the CPC. Thus, the High Court did not find whether the appellant had even crossed the first hurdle under s 317. It was therefore premature to consider whether the test laid down in *Che Din bin Ahmad v Public Prosecutor* [1976] 1 MLJ 289 had been complied with. The Court of Appeal had no reason to disagree with the High Court's conclusion (see para 6).

(2) Further, the power to admit additional evidence under s 317 is discretionary. In the instant case, the Court of Appeal was not convinced that the High Court judge had erred in his exercise of discretion to refuse admission of the 'Surat Akuan' as additional evidence for the purposes of the appeal. The Court of Appeal would also adopt the High Court's finding that the 'Surat Akuan' was irrelevant (see paras 8 and 9).

[Bahasa Malaysia summary

Perayu telah disabitkan dan dijatuhkan hukuman atas kesalahan rogol di mahkamah sesyen. Beliau merayu ke Mahkamah Tinggi terhadap sabitan dan hukuman. Di

A Mahkamah Tinggi, perayu telah memohon secara Notis Usul untuk membenarkan keterangan satu 'Surat Akuan' ataupun akuan berkanun oleh pengadu dalam tuduhan merogol yang dikenakan ke atasnya. Permohonan itu dibuat di bawah s 317 Kanun Acara Jenayah ('KAJ'). Mahkamah Tinggi walau bagaimanapun, telah menolak permohonan itu. Perayu membuat rayuan ke Mahkamah Rayuan. Dalam B hujahan di Mahkamah Rayuan, peguam menyatakan bahawa hakim Mahkamah Tinggi telah silap kerana tidak mengikut ujian yang terdapat dalam kes *Che Din bin Ahmad v Public Prosecutor* [1976] 1 MLJ 289 dan *Lau Foo Sun v Government of Malaysia* [1970] 2 MLJ 70.

C

Diputuskan, menolak rayuan:

(1) Mahkamah Tinggi mendapati bahawa permohonan perayu tidak termasuk dalam lingkungan s 317 KAJ. Oleh itu, Mahkamah tidak mendapati sama ada perayu telah melepasi rintangan pertama di bawah s 317. Oleh itu adalah D pra-masa untuk mempertimbangkan sama ada ujian dalam *Che Din bin Ahmad v Public Prosecutor* [1976] 1 MLJ 289 telah dipatuhi. Mahkamah Rayuan tidak mempunyai sebarang sebab untuk tidak bersetuju dengan kesimpulan Mahkamah Tinggi (lihat perenggan 6).

(2) Tambahan pula, kuasa untuk membenarkan keterangan tambahan di bawah s E 317 adalah mengikut budi bicara mahkamah. Dalam kes ini, Mahkamah Rayuan tidak yakin bahawa hakim Mahkamah Tinggi telah silap semasa menggunakan budi bicaranya untuk tidak menerima 'Surat Akuan' sebagai keterangan tambahan bagi tujuan rayuan. Mahkamah Rayuan juga akan menggunakan penemuan Mahkamah Tinggi bahawa 'Surat Akuan' itu tidak F relevan (lihat perenggan 8 dan 9).]

Notes

For cases on evidence, see 5(2) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 319–361.

For cases on admission of fresh or further evidence on appeal, see 7(1) *Mallal's Digest* G (4th Ed, 2003 Reissue) paras 1478–1490.

Cases referred to

Che Din bin Ahmad v Public Prosecutor [1976] 1 MLJ 289 (not folld)

Lau Foo Sun v Government of Malaysia [1970] 2 MLJ 70 (not folld)

H

Legislation referred to

Criminal Procedure Code s 317

Penal Code s 376

I **Appeal from**: Criminal Application No 44–17 of 1996 (High Court, Shah Alam)

George Proctor (Woo & Proctor) for the appellant.

Nurul Huda (Deputy Public Prosecutor, Attorney General's Chamber) for the respondent/ prosecution.

Richard Malanjum JCA (delivering judgment of the court):

[1] Before us was an appeal by the appellant against the decision of the learned High Court judge refusing his application to admit fresh evidence for consideration during the hearing of his appeal against the finding and decision of the sessions court made in connection with the charge preferred against him under s 376 of the Penal Code.

[2] The application was made by way of notice of motion pursuant to s 317 of the Criminal Procedure Code. The subject matter of the application was to admit in evidence a purported 'Surat Akuan' or statutory declaration by the complainant in the charge preferred against him.

[3] After hearing the submissions of the learned counsel for the appellant and the learned deputy public prosecutor, we dismissed the appeal as we did not find any error in the judgment of the learned High Court judge. We indicated that we would give our reasons later. We do so now.

[4] In his submission, learned counsel for the appellant complained that when rejecting the application of the appellant the learned High Court judge erred in not following the test as laid down in *Che Din bin Ahmad v Public Prosecutor* [1976] 1 MLJ 289 and *Lau Foo Sun v Government of Malaysia* [1970] 2 MLJ 70 namely:

(1) that the evidence sought to be introduced must be evidence not available at the time of the trial even with reasonable diligence;

(2) that the evidence must be relevant;

(3) that it must be credible evidence although it need not be incontrovertible; and

(4) that the court after considering the evidence, should proceed to consider whether there might have been reasonable doubt in the minds of the trial court (jury) as to the guilt of the accused if such evidence had been before the trial court together with the other evidence adduced.

[5] We have read and reread the judgment of the learned High Court judge. And in our view learned counsel for the appellant had missed the crucial and decisive point in the judgment. It is clear from the judgment that the learned judge was of the view that the application of the appellant did not come within the ambit of s 317. This is what he said:

> The application before this court is for the court to use and consider the 'Surat Akuan'. That document and the procedure proposed in the application is not known to s 317. The only evidence that could be considered is such evidence as taken by the judge himself, or by his direction, by a magistrate. It is essential that the evidence to be taken into consideration must comply with the provisions of the Criminal Procedure Code. Thus in *Mohamed bin Jamal v Public Prosecutor* [1964] MLJ 254, the evidence of and demonstration by the chemist was disallowed by the Federal Court because there was no evidence on record that the chemist had been sworn before the Judge. Neither was there on record that the other parties were given the opportunity to cross-examine the chemist.

[6] Obviously the learned judge did not find that the appellant had crossed the first hurdle in s 317. Hence it would be premature to consider whether the test as laid down in *Che Din bin Ahmad* had been complied with. With respect we have no reason to disagree with the conclusion arrived at by the learned High Court judge.

[7] In any event the power to admit additional evidence under s 317 is discretionary. The learned judge was correct in his approach when he said this:

> In *John Sze Lee v Public Prosecutor* (5 Mallal's Digest (4th Ed) p 40, Chong Siew Fai J (as his Lordship then was) held that s 317 of the Criminal Procedure Code gives discretionary power to admit additional evidence if it is necessary in the interest of justice. Such discretion has to the exercised sparingly.

[8] In this instant appeal, we are not convinced that the learned judge erred in his exercise of discretion to refuse admission of the Surat Akuan as additional evidence for the purpose of the appeal by the appellant.

[9] Learned counsel for the appellant also submitted that this court should not embark in making any finding of fact so as to cast doubt on the contents of the Surat Akuan. To this we gladly adopt what was said by the learned judge in cautionary fashion:

> The affidavit however discloses that the complainant is unlikely to give evidence to the effect as suggested by the applicant as contained in the 'Surat Akuan' which the complainant strongly disputed. It is clear in this case that the applicant approached and sought to persuade the complainant to retract her complaint and the evidence that she had given in court. In such circumstances, the 'Surat Akuan' is irrelevant on the consideration of the trial judge in coming to her decision.
>
> Even if the complainant had indeed made the 'Surat Akuan', such enterprise of approaching the complainant or any witness, totters on the fine line bordering upon tampering with evidence. So tainted, it cannot be used to affect the earlier sworn testimony given in court before the trial judge. It taints the parties that undertook such enterprise. It is not enough that it is included in the affidavit of the applicant that his lawyers would have nothing to do with the exercise: the use by the lawyers of the fruits of such exercise similarly taints the lawyers. And without question it taints this application.

[10] Accordingly, for the above reasons we dismissed the appeal of the appellant.

Appeal dismissed.

Reported by John Paul Simon